IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI

CRIMINAL APPEAL NO. 55 OF 2001

Shri Ritesh Morajkar,
son of Ramesh Morajkar,
resident of House No.38,
Bhatulem, Panaji, Goa. ... Appellant.

versus

STATE
through Police Inspector,
C.I.D. Branch, Panaji,Goa. ... Respondent.

Mr. J. Godinho, Advocate for the Appellant.

Mr. A. P. Lawande, Public Prosecutor for the State.

CORAM: P. V. HARDAS, J.

DATED: 2ND AUGUST, 2002.

ORAL JUDGMENT

The present Appeal has been filed by the Appellant/Original Accused challenging his conviction for an offence punishable under Section 21 of the N.D.P.S. Act, 1985 and sentence of Rigorous Imprisonment for ten years and fine of Rupees One Lakh, in default Simple Imprisonment for one year, passed by the Special Judge, N.D.P.S. Court, Mapusa, by Judgment dated 12th September, 2001, in Special Criminal Case No.11 of 1998.

2. The facts necessary for the decision of the Appeal are set out hereunder:-

P.W.6, P.I. Tony Fernandes, was attached to the C.I.D. Crime Branch as Police Inspector. On 29th January, 1998, at about 4-45 p.m., P.W.6, P.I. Tony Fernandes, received specific and reliable information that one Ritesh Morajkar, aged about 20 years, clean shaven, wearing jeans and white colour T-shirt was dealing with narcotic drugs and would wait near the junction of the road leading to Swim Sea Hotel/Beach Resort at Caranzalem and would have a consignment of heroin in his possession to be delivered to his prospective customers between 7 p.m. to 8 p.m. P.W.6, P.I. Tony Fernandes, reduced the said information into writing and sent a copy thereof to P.W.7, Shri A. K. Teli, Dy.S.P., Crime Branch. The said information received by P.W.7, Shri A. K. Teli, Dy. S.P., Crime Branch is at Exh.P.W.6/C colly. P.W.6, P.I. Tony Fernandes, then secured the presence of the panchas at 5-30 p.m. The panch witnesses are P.W.3, Hanumant Parulekar and P.W.4, Nivas Dessai. P.W.6, P.I. Tony Fernandes, requested the said two persons to act as panchas in the raid to be conducted at Caranzalem. He also informed them that he had received specific information that one Ritesh Morajkar, who was dealing with drugs would wait at the

junction of the road leading to the Swim Sea Hotel with the consignment of drugs. P.W.6, P.I. Tony Fernandes, also informed the panch witnesses that he had reduced the said information into writing and had sent a copy of the same to P.W.7, Shri A. K. Teli, Dy.S.P., Crime Branch. The panch witnesses were then introduced to the members of the raiding parties which comprised of various Police Officials. The members of the raiding parties carried with them the seal and other sealing material. The raiding parties then proceeded in two cars and one scooter. They reached Caranzalem at 6-40 hours and parked their vehicles in front of the Swim Sea Hotel outside the compound of the hotel. P.W.6, P.I. Tony Fernandes, Nilu Raut Dessai and Suresh Naik, P.S.I. proceeded to the junction of the road leading to the Swim Sea Hotel. P.W.6. P.I. Tony Fernandes, along with Suresh Naik, P.S.I. and a constable were waiting near a shed. At about 7-30 p.m., one person wearing jeans and T-shirt carrying a shoulder bag came near the junction on a motor cycle. The said person was sitting on the pillion and after alighting from the motor cycle, the driver of the motor cycle went ahead. On observing the said person, P.W.6, P.I. Tony Fernandes, informed the members of the raiding parties that the description of the person tallied with the description in respect of which he had received secret and

reliable information. At abouut 8-10 p.m., the members of the raiding parties were observing the said person and when they found that the said person was trying to stop the motor cycles for going to Miramar, P.W.6, P.I. Tony Fernandes, along with the panchas and the members of the raiding parties surrounded him.

3. P.W.6, P.I. Tony Fernandes, introduced himself to the Accused and also introduced the panchas and the other members of the raiding parties. On being asked, the said person disclosed his name as Ritesh Ramesh Morajkar. P.W.6, P.I. Tony Fernandes, then informed him that he had received specific and reliable information that the said person was dealing in narcotic drugs and, therefore, P.W.6, P.I. Tony Fernandes, wanted to search him. P.W.6, P.I. Tony Fernandes, also informed the Accused that he had a right to be searched before a Gazetted Officer or a Magistrate and that he is also entitled to search the members of the raiding parties including the panchas. The Accused declined both the offers. The Accused was holding a green colour shoulder bag. P.W.6, P.I. Tony Fernandes, then asked the Accused to keep the shoulder bag on the ground and opened the main compartment of the shoulder bag. On opening the bag, P.W.6, P.I. Tony Fernandes, found whitish substance in a pink polythene bag. On seeing the whitish

colour substance, P.W.6, P.I. Tony Fernandes, suspected the substance to be heroin. The substance along with the bags was weighed and it was found to weigh 2.1 kgs. P.W.6, P.I. Tony Fernandes, then removed two samples of 50 gms.each and sealed the same in two separate envelopes with the seal of the Crime Branch. The sample was signed by the Accused and the panchas and P.W.6, P.I. Tony Fernandes. The remaining quantity of the substance weighing about 2 kgs. was put in a transparent bag and sealed as before. The search of the other compartments in the bag did not yield any incriminating material. The bag was folded and put in a jute bag and thereafter packed and sealed as before. In the left side pant pocket of the Accused, an autopress packet having some substance was found. It was weighing about 14 gms. It was then packed and sealed as before. The search of the other pockets yielded a handkerchief, visiting card, photographs and a xerox copy of the driving licence. The search of the shoes of the Accused also did not yield any incriminating material. P.W.6, P.I. Tony Fernandes, then asked the Accused to produce legal documents of possession of the narcotic drugs. The Accused could not produce any documents regarding the possession of the drugs and P.W.6, P.I. Tony Fernandes, therefore, told the Accused that possession of drugs without any valid licence was an offence and

took him in custody. An offer was made to the Accused to search the members of the raiding parties including panchas which offer was declined by the Accused. A panchanama of the sequence of events Exh.P.W.3/A was drawn. The Seizure Report at Exh.P.W.3/B was also scribed. On return to the Police Station, P.W.6, P.I. Tony Fernandes, filed a complaint at Exh.P.W.6/A and registered the offence. Copy of the F.I.R. is at Exh.P.W.6/B. The grounds of Arrest explained to the Accused is at Exh.P.W.6/D. Copy of the intimation sent to the immediate superior in compliance of Section 57 is at Exh.P.W.6/E. The Arrest Card of the Accused is at Exh.P.W.6/F. The wireless message informing the father of the Accused regarding the arrest is at Exh.P.W.6/G. The covering letter and the specimen seal are at Exh.P.W.1/A colly at which the sample was sent for analysis. The house of the Accused was searched but nothing incriminating was found. The panchanama is at Exh.P.W.6/I. After completion of the investigation, a charge-sheet against the Accused was filed.

4. Charge against the Accused vide Exh.4 was framed for an offence punishable under Section 21 of the N.D.P.S. Act, 1985. The Accused denied his guilt and claimed to be tried. The prosecution in support of its case examined ten witnesses.

5. P.W.1, Mahesh Kaissare, had examined the samples and by his report at Exh.P.W.1/B had opined that the samples analysed by him tested positive for Codeine Phosphate. P.W.2, Manohar D. Joshi, had received the samples on 30th January, 1998 and had forwarded the same for analysis. P.W.3, Hanumant Parulekar and P.W.4, Nivas Dessai, are the panch witnesses. P.W.5, Guru Prasad Mhapne, was a member of the raiding party. P.W.6, P.I. Tony Fernandes, is the Raiding Officer. P.W.7, Appa Teli, Dy.S.P. is the immediate superior of P.W.6, P.I. Tony Fernandes, to whom information towards the compliance of Sections 42 and 57 of the N.D.P.S. Act, 1985 was sent. P.W.8, L.S. Mamledar, P.I. had received the samples on 30th January, 1998 and had handed over the same to Shri Uday Naik, P.S.I. for keeping it in safe custody. P.W.9. is Uday Naik, P.S.I. who had kept the sealed parcels in safe custody on the instructions of P.W.8, L.S. Mamledar, P.I. P.W.10, Mohan Naik, is the carrier of the samples to the Food and Drug Administration for analysis. The Accused has filed his written statement at Exh.24 contending therein that a false case has been filed against him.

6. The learned Trial Court on appreciating the evidence convicted and sentenced the Accused as aforestated.

7. P.W.3, Hanumant Parulekar, was declared hostile by the prosecution and cross-examined. In the cross-examination, P.W.3, Hanumant Parulekar, admitted that one policeman whom he does not know had come to him near a hotel to call him to act as a panch. He also admits that he did not know P.W.6, P.I. Tony Fernandes. He further states that he had gone to the said hotel for casual purpose and went with the policeman to the Office and was made to sit outside the Office for about ten minutes. He also states that he was taken inside the Office of P.W.6, P.I. Tony Fernandes, and sat inside for about ten to fifteen minutes. He admits that he was informed by P.W.6, P.I. Tony Fernandes, regarding the reliable information which had been received by him. He further states "besides the police and me there was no other third person present for the raid". Thus, this witness in terms states that P.W.4, Nivas Dessai, the other panch was not present. He also admits that at the place where they were standing there was no light. He further admits that at the time of the raid, except him and the Police, no other persons were present. He states that the raid lasted for about twenty minutes

and during these twenty minutes, he does not remember what talk P.W.6, P.I. Tony Fernandes, had with the Accused or any other Officer had with the Accused. He further states that after the raid, he had gone back to the Police Station and the Accused was first taken to the chamber of P.W.6, P.I. Tony Fernandes. In the chamber apart from him, Accused and the Police, no other person was present.

8. In the cross-examination, P.W.3, Hanumant Parulekar, has given the following admission "there was no writing done on the road in front of Swim Sea Hotel. No packing or sealing was done on the road outside the Swim Sea Hotel. I do not remembered whether there was light to the road of the length of 20 metres which leads to the hotel Swim Sea. I do not remembered whether there was light near the place where we had parked our vehicle. I do not remembered where the vehicles were parked near the Swim Sea hotel". P.W.6, P.I. Tony Fernandes, has stated that the panchanama and the other writing was done under the illuminated spot of the sodium light existing on the spot. P.W.6, P.I. Tony Fernandes, has admitted that the vehicles were parked in front of the hotel.

9. P.W.3, Hanumnt Parulekar, has given further admissions in the cross-examination to the effect (I)

"I did not see the Police taking anything from the pocket of the Accused. I did not see the Police taking anything from the shoulder bag which was with the Accused nor the Police showed me anything". (II) "I admit that I have not seen the packing/weighing and sealing". (III) "I admit that I do not know what was packed and sealed in the envelopes". (IV) "I admit that the panchanama was drawn at the Police Station and I had signed the same at the Police Station". (V) "I admit that packing, weighing and sealing was not done on the road in front of Swim Sea Hotel". (VI) " It is true that P.I. had not told the Accused that he has a right to search the Police and the panchas".

10. P.W.4, Nivas Dessai, is the other panch. In the Examination-in- Chief, he speaks about the search and the seizure of the drugs from the pant pocket and the shoulder bag of the Accused. In the cross-examination, P.W.4, Nivas Dessai, admits that he was knowing P.W.6, P.I. Tony Fernandes, before. He also admits that he has acted as a pancha. He also admits that P.W.6, P.I. Tony Fernandes, was staying at a distance of 4 kms. from his house. He has also admitted that he has visited the house of P.W.6, P.I. Tony Fernandes, at least five times after the incident. He admits that he was supplying sand to the friend of P.W.6, P.I. Tony Fernandes and in

connection with the sale of sand, he had gone to the house of P.W.6, P.I. Tony Fernandes. He further admits that he was a driver of a truck of one Manohar Dessai. He has admitted that prior to the employment as a driver of the truck of Manohar Dessai, he had no occasion to drive a vehicle of any person. He admits that he had acted as a panch in a case in which P.W.6, P.I. Tony Fernandes, was one of the Police Officers. He further states that on the day of the incident, he had gone to the Police Station at about 5-30 p.m. along with a friend and on seeing him, P.W.6. P.I. Tony Fernandes, had called him to his Office. He admits that in the Office, there was one more person who was sitting. He also admits that he had a talk with P.W.6, P.I. Tony Fernandes and thereafter, all of them had gone to Caranzalem for raid. P.W.4, Nivas Dessai, speaks about the presence of P.W.3, Hanumant Parulekar, in the chamber at the place of the raid and in the Police Station after the raid. He, however, maintains that he was not introduced to the other panch and he did not talk to him at all. P.W.4, Nivas Dessai, then gives an admission that "P.I. asked the Accused to open the shoulder bag which he was having. P.I. did not speak anything. Prior to that, P.I. did not speak anything to the Accused. The Accused thereafter opened the bag". P.W.4, Nivas Dessai, also admits that the panchanama was drawn by the side of

the road. He admits that the panchanama was scribed in the light of the street lights which were installed on the road divider. He admitted that he had come to the Court in the car of P.W.6, P.I. Tony Fernandes. He denied the suggestion that the car was driven by him. He admitted that on earlier two occasions, he had come in the Court in the car of P.W.6. P.I. Tony Fernandes. He denied the suggestion that he was a driver of the car of P.W.6. P.I. Tony Fernandes. He also denied that he was driving the family of P.W.6. P.I. Tony Fernandes to the church every Sundays in the car and also dropping the children to the school. P.W.4, Nivas Dessai, had stated that he had never driven the car belonging to P.W.6. P.I. Tony Fernandes. He states that a policeman had come at the place where he was standing and had asked who was "Nivas Dessai" and on P.W.4. Nivas Dessai identifying himself he was told that he was called by P.W.6, P.I. Tony Fernandes. He admits that the panchanama was not read over to him in Konkani. He further admitted in the cross-examination that only 175 gms. of sample was taken and the other was of 14 gms.

11. In the further cross-examination on behalf of the Accused, P.W.4, Nivas Dessai, has admitted that he does not remember what were the exact words used by

P.W.6, P.I. Tony Fernandes, to convey the right under Section 50 of the N,D.P.S. Act, 1985. He in fact, says "P.I. questioned the Accused whether he can search him and the Accused replied that he can search. To the suggestion that no offer was given to the Accused, the Accused himself volunteered for the search".

12. P.W.6, P.I. Tony Fernandes, has admitted that he was knowing P.W.4, Nivas Dessai, as he was from his village. He has admitted that he was knowing P.W.4, Nivas Dessai, since last 4 to 5 years before the raid. In the cross-examination, he was shown the photographs marked as Exh.P.W.6/D4. He was shown another photograph Exh.P.W.6/D5. P.W.6, P.I. Tony Fernandes, initially denied that P.W.4, Nivas Dessai, was his driver. However, when he was shown the photographs at Exh.P.W.6/D2, he admitted that the car in the photographs belonged to his wife and the driver sitting at the stearing wheel of the car was P.W.4, Nivas Dessai. P.W.6, P.I. Tony Fernandes, has further admitted in the cross-examination that the conversation with the Accused was in Konkani. He has admitted that he was not able to repeat the actual words used to convey the right to be searched before a Gazetted Officer or a Magistrate. He has further admitted in the cross-examination that P.W.4, Nivas

Dessai, visited him on different occasions after the raid for business purpose.

13. P.W.3, Hanumant Parulekar, was declared hostile by the prosecution and cross-examined. In the cross-examination on behalf of the prosecution, he has virtually admitted the entire prosecution case. However, in the cross-examination on behalf of the Accused, he has given certain damaging admissions. The said damaging admissions have been reproduced by me in the earlier part of the Judgment. According to P.W.3, Hanumant Parulekar, P.W.4, Nivas Dessai, was not present at all. If, P.W.3, Hanumant Parulekar, is taken to be present at the scene of the offence, the damaging admissions in respect of the drugs not being sealed at the spot deals a death blow to the prosecution case. So also his admission that P.W.4, Nivas Dessai, was not present is fatal to the prosecution case. The evidence of P.W.3, Hanumant Parulekar, cannot be altogether ignored. However, the evidence of P.W.4, Nivas Dessai, and P.W.6, P.I. Tony Fernandes, needs to be carefully scrutinised to appreciate that despite the evidence of P.W.3, Hanumant Parulekar, whether their evidence inspires confidence.

14. The attempt of P.W.4, Nivas Dessai and P.W.6, P.I. Tony Fernandes, in totally denying that P.W.4, Nivas Dessai, was a driver employed by P.W.6, P.I. Tony Fernandes, is inexplicable. In fact, both of them are proved to have stated falsely in this regard by the photographs which were shown to P.W.6. P.I. Tony Fernandes in which he admitted that the car belonging to his wife was being driven by P.W.4, Nivas Dessai. All in all, the evidence of P.W.4, Nivas Dessai, who was acquainted with P.W.6. P.I. Tony Fernandes, and summoned by name by P.W.6. P.I. Tony Fernandes, does not inspire confidence at all. The evidence of P.W.6, P.I. Tony Fernandes, leaves a lot to be desired. A vain attempt on his part to cover up the part of P.W.4, Nivas Dessai, who was a driver employed by him goes a long way and affects their credibility.

15. Apart from this, there is no satisfactory evidence at all in regard to the compliance of Section 50 of the N.D.P.S. Act, 1985. Both the panch by virtue of their admissions have stated that the Accused was not apprised of his right under Section 50 of the N.D.P.S. Act, 1985. Even P.W.6, P.I. Tony Fernandes, when asked in the cross-examination was unable to reproduce the exact words in Konkani used to apprise the Accused regarding his right under Section

50 of the N.D.P.S. Act, 1985. All in all, the evidence of the prosecution witnesses does not inspire confidence at all. These discrepancies which according to me go to the root of the case and affect the fabric and the substratum of the prosecution case results in discrediting the version of the prosecution particularly that of P.W.3, Hanumant Parulekar, P.W.4, Nivas Dessai and P.W.6, P.I. Tony Fernandes. It is true that an offence of the N.D.P.S. Act, 1985 is a serious offence. Huge quantity of heroin in this case has been seized. But these facts should not affect the appreciation of the evidence and if the Court finds that the evidence is not reliable, the Accused cannot be convicted merely because of the seriousness or the gravity of the offence. I, therefore, have no hesitation in holding that the evidence of the prosecution witnesses is wholly unreliable and cannot be used to sustain the conviction passed against the Appellant.

16. For the aforesaid reasons, the conviction and sentence passed against the Accused deserves to be quashed and set aside and the Appeal deserves to be allowed. The conviction and sentence passed against the Appellant by the Special Judge, N.D.P.S. Court, Mapusa, in Special Criminal Case No.11 of 1998 convicting the Appellant for an offence punishable

under Section 21 of the N.D.P.S. Act, 1985 and sentencing him to suffer Rigorous Imprisonment for ten years and fine of Rs.1,00,000/-, in default Simple Imprisonment for one year is hereby quashed and set aside and the Appellant is acquitted for the offence for which he is charged. The Appellant is set at liberty. Fine if paid be refunded to the Appellant.

P. V. HARDAS, J.